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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 675

SHERMAN B. HOGAN, CENTRAL TRUCK LINES, INC., and FIREMAN'S FUND INDEMNITY COMPANY,
Petitioners,

Versus

ANNA LAURA WILLIAMS and CARRIE JACKSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

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No. .....

SHERMAN B. HOGAN, CENTRAL TRUCK LINES, INC., and FIREMAN'S FUND INDEMNITY COMPANY,

Petitioners,

versus

ANNA LAURA WILLIAMS and CARRIE JACKSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Sherman B. Hogan, Central Truck Lines, Inc., and Fireman's Fund Indemnity Company petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in these cases on December 7, 1951.

I.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code [28 U. S. C. A. 1254(1)]. The judgment of the Court of Appeals was entered December 7, 1951. Petition for rehearing was denied January 9, 1952.

II.

Preliminary Statement.

Respondents, Anna Laura Williams and Carrie Jackson, brought separate actions against petitioners, each seeking damages for the death of a daughter killed in a collision between a school bus, in which the deceased daughters were riding, and a truck driven by petitioner Hogan, owned by Petitioner Central Truck Lines, and insured against negligence by petitioner Fireman's Fund Indemnity Company. The two cases, involving the same accident, were consolidated for trial in the District Court, and appeals were consolidated and heard by the United States Court of Appeals for the Fifth Circuit on one record, and one decision rendered by the Court of Appeals. One question presented and decided by the Court of Appeals is involved only in the case of Anna Laura Williams, and that question is also presented here. The other question presented here is common to both cases. Hence, it is thought that one petition and one record will serve the purpose and save the time and energy of this Court.

III.

Questions Presented.

A.

Question involved only in Anna Laura Williams case.

1. Whether the United States Court of Appeals has decided an important question of local law in a way probably in conflict with a statute of the State of Georgia, and applicable decisions of the Supreme Court of Georgia (Georgia Code 105-1307) providing that a mother, or, if no mother, a father, may recover for the homicide of a child upon whom she or he is dependent and who contributes to her or his support, which statute has been construed by the highest court in Georgia, to-wit: the Supreme Court of Georgia, to mean that the condition of dependence contemplated by such section is that of the parent with relation to his or her personal need of aid in obtaining a livelihood and that a parent whose earnings are enough to more than afford her or him individually a support commensurate with her or his circumstances and standing in life is not, under the provisions of this section, entitled to recover for the homicide of a child whose contributions to the parent assisted the plaintiff parent in taking care of others whose support the parent had voluntarily undertaken or with which the parent was legally chargeable; and where, as in this case, the undisputed evidence showed that the mother for nearly six years prior to the death of her daughter lived in New York City and her daughter lived in Georgia with plaintiff's mother, the child's grandmother, and the plaintiff (mother) had individual earnings not only sufficient for her own support but also for the support of her mother and daughter in Georgia, and where the daugh-

ter contributed no money to the support of her mother, and the services of the daughter were largely rendered to the grandmother, and where the plaintiff (mother) testified positively that she did not receive any support from her daughter or any part of it and that the daughter did not render any service to her for her own support, and that the services of the daughter were services she rendered to her grandmother, and where the United States Court of Appeals decided that notwithstanding the construction placed upon said statute by the Supreme Court of Georgia, as aforesaid, the question of the mother's right to bring the action was one for a jury to decide.

2. Whether the United States Court of Appeals has erroneously construed a Georgia statute, and the applicable decisions of the Supreme Court of Georgia, when it decided that although a mother was not in any way dependent upon a child for monetary support, the mother having ample financial means of support, the mother might still be held to be dependent upon the child in the form of services, which would be considered as rendered for support.

3. Whether the United States Court of Appeals is required to apply the State law, in a case in which such law is controlling, to the effect that the testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him.

B.

Question presented which is common to both cases.

1. Whether, in cases brought against the driver of a motor truck against the owner of that truck and against an insurance company carrying liability insurance on the truck, for damages growing out of the alleged negligence

of the driver of the truck (it being permissible under a Georgia statute to join the insurance carrier as a party to such suit), the trial judge at the special written request of defendants, now petitioners, should have admonished the jury that they should not consider the fact that the defendant insurance company issued a policy of liability insurance to protect the owner of the truck in determining whether or not the driver was negligent and liable to the plaintiffs, where the liability of the driver, of the owner, and of the insurance company was solely dependent upon the finding of negligence against the driver.

IV.

Statement of Matter Involved.

A.

Statement of matter involved relating to Anna Laura Williams case.

Anna Laura Williams, Respondent, brought action against petitioners for the homicide of her minor daughter based on Georgia Code, Section 105-1307, which reads:

> "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or *sui juris*, upon whom she or he is dependent, or who contributes to her or his support, unless said child shall leave a wife, husband, or child. The mother or father shall be entitled to recover the full value of the life of such child."

The only question involved here is whether, under the undisputed evidence, Anna Laura Williams brought herself within the provisions of the above statute of Georgia (Code 105-1307) as construed by the Supreme Court of Georgia, the highest court in the State.

It is only necessary for the purposes of this petition to consider the undisputed evidence of Anna Laura Williams as to dependency upon her daughter for support and the contributions from her daughter for support.

The testimony of Anna Laura Williams (R. 77 to 88) was that at the time her daughter was killed she lived in New York City and had been living there over 5 years. Before that time she had lived in Waycross with her own mother and with her daughter, Billie D. Williams, and had looked after her mother for around 11 years. That she left Waycross and went to New York in August, 1944, because she could get more money there; that in New York she earned $30.00 per week and room and board, doing domestic work; while in New York she sent money home for the support of her mother and daughter, her daughter having remained in Waycross; that her daughter stayed and looked after Anna Laura's mother, the daughter's grandmother; that she depended upon her daughter, Billie D., to keep her informed about her mother, Billie D. doing all the writing; and that the daughter, Billie D., did practically everything for her grandmother, helping to wash and iron and cook and clean house and run errands for the grandmother. Some six months after her daughter's death, Anna Laura Williams moved back to Waycross and at the time of trial was working at Waycross and living with her mother.

On cross examination (R. 84) Anna Laura Williams, the plaintiff, testified:

> "Q. So you were in New York nearly 6 years? A. Yes, sir.
>
> Q. When you went to New York you got a position at $30.00 a week and your board and room? A. Yes, sir.
>
> Q. And you continued that work until you came back? I mean you got that much money? A. Yes, sir.

Q. Continuously until you moved back? A. Yes, sir.

Q. Were you discharged in New York? A. No, sir.

Q. You voluntarily quit your job up there and came back here? A. Yes, I did.

Q. Did you receive any money from your daughter to support you? A. No, sir, I did not.

Q. You rather supported your mother and your daughter yourself, did you not? A. Yes, sir.

Q. Except for what your mother made? A. Yes, sir.

Q. Your mother made some money, too? A. Yes, sir.

Q. As far as your own support, you did not receive any support from your daughter or any part of it? A. No, sir, I didn't.

Q. You didn't? A. No, sir.

Q. The services your daughter rendered were services she rendered to her grandmother? A. Yes, sir.

Q. Your mother? A. Yes, sir.

Q. She did not render any services to you for your own support? A. No, sir."

At the conclusion of the evidence defendants (now petitioners) moved for a verdict to be directed in their favor upon the ground that under the undisputed evidence Anna Laura Williams was not entitled to recover because there was no evidence to show that she was dependent upon her deceased daughter for her own support and that the evidence showed the deceased daughter did not contribute either in services or in money to the support of her mother (R. 187). This motion was overruled by the trial judge (R. 188).

The decision of the Court of Appeals, in affirming the lower court on this issue, is in conflict with the decision of the Supreme Court of Georgia in the case of *Georgia Rail-*

road & Banking Company v. *Spinks*, 111 Ga. 571, *and other cases decided* by the same court, construing the statute upon which the case is predicated.

B.

Statement of matter involved on question common to both cases.

These cases involved the usual negligent features incident to a collision between a school bus and a truck on the highway. The two plaintiffs sued the driver of the truck, its owner and its insurance carrier, and also the driver of the school bus. The owner of the truck, Central Truck Lines, Inc., was a motor common carrier operating under a certificate from the Georgia Public Service Commission, and under Georgia Code section 68-612 it was permissible for the insurance company to be sued jointly with the motor common carrier, although the liability is based on the negligence of the motor carrier, or its driver. The policy of insurance was attached to and made a part of the complaint. It was a large policy, with limits of $50,000.00 for any one injury, and $250,000.00 for any one accident. Although petitioners admitted the existence and effect of the policy in their answer, the trial judge in the midst of his charge inquired openly before the jury for an admission that the policy of insurance also covered the driver of the truck, Sherman B. Hogan, as well as Central Truck Lines (Record 221), and when counsel for petitioners suggested that the question of insurance was being magnified too much, the trial judge only told the jury that it made no difference to him who wins the case and that it was agreed that the insurance company was the insurer of Sherman B. Hogan and Central Truck Lines (Record 222). Petitioners specially requested in writing that the trial judge charge the jury as follows:

"I charge you further that the fact that Fireman's Fund Indemnity Company issued a policy of Liability insurance to protect Central Truck Lines, Inc. must not be considered by you in determining whether or not the defendant, Sherman B. Hogan the driver of the truck, is liable to the plaintiff under the instructions given you by the Court. The Court reminds you that you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether or not Sherman B. Hogan was negligent you should be influenced to the least degree by the existence of the liability insurance policy of Fireman's Fund Indemnity Company, then your verdict would be an improper one, and one without proper foundation."

The request was refused and exception noted.

V.

Reasons Relied on for Allowance of Writ.

A.

On question involved only in Anna Laura Williams case.

1. The Georgia statute involved only gives a right of action to a mother for the homicide of a child upon whom she is dependent for support, *and* who contributes to her support. The Supreme Court of Georgia, in *Georgia Railroad & Banking Company* v. *Spinks*, 111 Ga. 571, 572, held that,

> "The condition of dependence contemplated by the General Assembly (statute) was that of the parent with relation to his or her personal need of aid in obtaining a livelihood. We cannot believe it was the legislative intention to assist a self-sustaining father in taking care of others whose support he had voluntarily undertaken or with which he was legally chargeable."

The same construction was applied by the Georgia Supreme Court with respect to a self-sustaining mother in the case of *Atlantic Coast Line Railroad Company* v. *McDonald,* 135 Ga. 635 (7-a), and *Savannah Electric Co.* v. *Bell,* 135 Ga. 663, 664. These cases have not been over-ruled, or even criticized, and were followed by the Court of Appeals for the Fifth Circuit in *Trammel* v. *Southern Ry. Co.,* 182 Fed. 789. In its present decision the Court of Appeals holds that, notwithstanding the mother was not dependent upon the child financially for support, but was independent, she might nevertheless be found to be dependent *for support* upon small services rendered by the child. This is contrary to the construction placed on this statute by the highest Georgia Court, and extends the Georgia statute far beyond any of the Georgia decisions, thus enabling litigants to recover under this statute in a Federal Court, where this would not be possible in a state court.

2. The Court of Appeals decision, in distinguishing this case from the *Spinks* case, *supra,* did so on the theory that in the *Spinks* case "the only contributions relied upon were those in money," and not "that the parent depended upon or received contributions from the child in the form of services." In this the Court of Appeals overlooked the fact that the theory upon which the Georgia courts hold that services rendered by the child can be considered as contributions to support, is that the services can be to some extent reduced to a money value, however small. The effect of the Court of Appeals decision is to write out of the Georgia decisions this theory, and to write into the *Spinks* case the proposition that if the son had rendered service to the self-sustaining father, rather than furnishing money, the decision would have been different. This conflicts with all the Georgia decisions, which will be cited in the accompanying brief.

3. The force or impact of the decision of the United States Court of Appeals is calculated to move in a wide orbit and, as contended here, where it is in apparent conflict with the true meaning of the Georgia statute, and the decisions of the Georgia Supreme Court, the Federal Court will fail in its duty to ascertain and apply state law in a case in which such law is controlling.

B.

As to question common to both cases.

1. It is almost universally recognized by the courts of all jurisdictions that the fact that a defendant in a negligence case is protected by liability insurance, when made known to a jury, tends to prejudice that defendant's case, on the theory that the defendant will not be harmed, but that the loss will fall upon an insurance company. In cases where the existence of insurance has been erroneously injected into a case, mistrials have been granted. In the cases where the fact that insurance exists is a relevant fact on some incidental issue, the courts have firmly stated that the jury should be cautioned not to consider it in regard to defendant's duty or liability to plaintiff. In these cases the Georgia law permitted the insurance company to be made a party and this necessarily permitted the jury to have knowledge of the insurance, but still this tended to produce the same harmful effect upon the jury as would be the case where the insurance feature was injected erroneously, or as relevant to some incidental issue, and common justice required that the jury be specially admonished not to consider the insurance in determining the question of negligence or liability.

2. The Court of Appeals' decision (193 F. 2d, 220, at p. 235) holds that in a case of this kind truthful references

to insurance could not magnify this as an issue, and that the language of the request might prevent the plaintiffs from securing a fair appraisal by the jury of the question of negligence. Thus the Court of Appeals has established a rule for the Fifth Circuit which is contrary to the rulings of all the other circuits. This Court should recognize the serious handicap to parties covered by insurance, and to insurance companies, since cases of this kind are now so numerous, and categorically hold that a trial judge cannot be too zealous in admonishing a jury to disassociate from their minds the insurance policy when considering the question of negligence. The question is of far reaching importance and warrants consideration and correction by this Court.

A supporting brief accompanies this petition.

Wherefore, petitioners respectfully pray that a writ of certiorari issue to review the judgment complained of, and that said judgment may be reversed by this Honorable Court.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

Decisions of the Courts Below.

The opinion of the United States Court of Appeals for Fifth Circuit is shown in the record at page 260, and is reported in 193 F. 2d 220. The opinion of the District Judge is shown in the record at page 235.

2.

Jurisdiction.

The jurisdiction of this Court is invoked under section 1254 (1) of the Judicial Code (28 U. S. C. A. 1254 (1)), upon the ground that the Circuit Court has decided questions contrary to local law and to decisions of other Circuit Courts.

3.

Statement of Case.

A statement of the matters involved appears in subdivision IV A and B of the petition, for certiorari, and in the interest of brevity is not repeated.

4.

Questions Presented.

These questions are stated in subdivision III A and B of the foregoing petition and for sake of brevity will not be repeated.

5.

Specification of Errors.

In Anna Laura Williams Case.

1. The Circuit Court rendered its decision contrary to the Georgia Statute and the decisions of the Supreme Court of Georgia, in deciding that under the undisputed facts the mother was dependent upon her deceased daughter for support, and that the daughter contributed to her mother's support.

2. The Circuit Court erred in failing to apply the law of Georgia, that a person testifying in his own behalf is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him.

On Question Common to Both Cases.

3. The Circuit Court erred in holding that the trial judge was not required to charge the jury that they should not consider the insurance in determining the question of negligence, contrary to the decisions of other Circuit Courts, and of the appellate courts of Georgia.

6.

Argument.

1. The Circuit Court rendered its decision contrary to the Georgia Statute and the decisions of the Supreme Court of Georgia, in deciding that under the undisputed facts the mother was dependent upon her deceased daughter for support, and that the daughter contributed to her mother's support.

The evidence shows without dispute that the mother, Anna Laura Williams, several years prior to the accident,

had moved to New York and was living there at the time of the daughter's death. The daughter remained in Waycross and lived with her grandmother, Claudia Myrick. The services rendered by the daughter were rendered to the grandmother. The daughter wrote to her mother in New York and the mother sent money home, both for the daughter and the grandmother, and the daughter disbursed this money for these purposes. The daughter also ran errands. It was contended that the mother was enabled to go to New York because of the fact that the daughter stayed home and looked after the grandmother.

The Circuit Court of Appeals in its opinion held that the writing of letters to the mother in New York, the disbursing of funds sent by the mother for the support of the daughter and grandmother, the running of errands and the fact that the daughter stayed with the grandmother, enabling the mother to free herself and go to New York, were sufficient to constitute dependency and contribution under the Georgia law. We submit that this is contrary both to the Statute and to the decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia construing the Statute.

The Statute involved is Code Section 105-1307 of the Code of Georgia of 1933, as follows:

> "*Homicide of child.*—A mother, or, if no mother, a father, may recover for the homicide of a child, minor or *sui juris,* upon whom she or he is dependent, or who contributes to her or his support, unless said child shall leave a wife, husband, or child. The mother or father shall be entitled to recover the full value of the life of such child."

Under the decisions of the Supreme Court of Georgia construing this statute, the word "or" before the words

"who contributes" should be construed to mean "and". In other words, the Statute requires both dependency *and* contribution.

Clay v. *Central Railroad and Banking Company*, 84 Ga. 345;
Smith v. *Hatcher*, 102 Ga. 158.

In the case of *Georgia Railroad and Banking Co.* v. *Spinks*, 111 Ga. 571, a father sued for the death of a minor son. The son's mother was dead. The father had married again and he and his second wife had minor children. The father made enough to support himself but not enough to support himself *and* his second wife and minor children. The deceased son had contributed to the father to help him support his family. The Supreme Court of Georgia held that under these facts and circumstances the father was not dependent on the son within the meaning of the Statute. This case, we submit, is directly contrary to the holding of the Circuit Court of Appeals in this case.

Insofar as the case under consideration is concerned the evidence clearly showed that the mother in this case was not dependent on the daughter for support and that the daughter did not contribute any money to her support.

The Circuit Court of Appeals, however, held that the services performed by the daughter were sufficient to form the basis for dependency and support. In this connection see the case of *Fuller* v. *Inman*, 10 Ga. App. 680, in which the Court of Appeals of Georgia held that the mother could recover for the death of a child where the child rendered services for her around the house, etc. In discussing the question of dependence, the Court says on page 687:

> "The dependence and contribution to support must not be fanciful. It must not be imaginary; it must be real; it must be actual; it must be to such an

> extent as substantially or materially to aid the parent."

On page 689 the Court points out that the child need not contribute money but that if he performed substantial services in and about the household, etc., this is a contribution to her support.

We respectfully submit that the holding of the Circuit Court of Appeals that the alleged services were sufficient to constitute the basis for dependency and contribution is contrary to the Statute and the Georgia decisions construing the Statute hereinabove referred to for the following reasons.

In the first place, in the case of *Fuller* v. *Inman*, 10 Ga. App. 680, on page 688, the court states: "The statute contemplates individual dependence." We submit that the Statute and decisions contemplate, therefore, that the services, in order to form the basis of dependency and contribution, must be of a personal nature and rendered to the dependent parent. Also, in the case last cited, on page 689, the Court says:

> "If he performs substantial services, of which she receives the benefit *in and about the household*, this is contribution to her support, and she is dependent upon that child, within the meaning of the law, . . ." (Emphasis supplied.)

We submit also that the contemplation of the Statute and the Georgia decisions is that these services shall be rendered in and about the household. In other words, if a child aids with the cooking, washing dishes, making beds, cleaning house and things of that nature, under our Georgia decisions such services may form the basis for dependency and contribution.

In the case under consideration, the services rendered by the daughter were not rendered to the mother but to the grandmother. The mother herself testified to this effect (R. 85):

> "Q. The services your daughter rendered were services she rendered to her grandmother? A. Yes.
> Q. She did not render any services to you for your support? A. No, sir."

The services were not personal to the mother at all and were not even rendered to her but were rendered to the grandmother and certainly they were not rendered in and about the household of the mother since the mother lived in New York and the daughter remained in Waycross, Georgia, with her grandmother and it was in Waycross that the alleged services were supposed to have been rendered.

In the next place, to say that writing letters to the mother, which may have had the effect of giving the mother a certain peace of mind, constituted such a service as would be the basis of dependency and contribution seems to us more imaginary than real. Also, the same applies to the running of errands. How could the running of errands by the daughter in Waycross be the basis for dependency and support of the mother living in New York?

Likewise, to say that the fact that the daughter stayed with the grandmother and thereby enabled the mother to go off to New York where she could make more money constituted dependency and contribution is not sound and is more fanciful than real. It seems to us that it is much more realistic to say that this was more a matter of convenience to the mother and it is more likely that the grandmother, by taking care of the child and providing a home for her, is the one who enabled the mother to be freed of her parental responsibilities so that she could go to New York and make more money.

In addition, the holding that the disbursing of the money sent home by the mother for the daughter and grandmother as a basis for dependency and contribution is certainly trivial and fanciful. Such services were not rendered to the mother but to the grandmother and were not rendered in the mother's household in New York but in Waycross, Georgia. If this in fact might have contributed to the peace of mind of the mother far away in New York, this was merely incidental, and surely, was not substantial enough to constitute dependency and contribution. Any child merely by being happy and well contributes to the peace of mind of the parent.

By way of illustration, let us suppose a case where a widowed mother has a minor child to support. If she has to make a home for that child and be at home most of the time with the child, she can do certain types of work. But if she can send the child away to boarding school, she can then free herself of her parental responsibilities and go out and get herself a better job. How can it logically be said that in this situation the mother, by sending the child away to boarding school, is thus dependent on the child for support? With all due respect to the Circuit Court of Appeals, it seems to us that this is absurd and it certainly is not in accord with the statute and the decisions of Georgia hereinabove referred to. We respectfully submit that it would be even more absurd to say that if the child writes home from boarding school and thereby contributes to the peace of mind of the mother, that this is a basis for dependency and support. This is not what the Statute and the Georgia decisions above hold.

As above pointed out, the services relied on as the basis for dependency and support, by the testimony of the mother herself, were rendered not to the mother but to the grandmother. The holding of the Circuit Court of Appeals that

such services thus rendered to the grandmother may form the basis of dependency and support is, we submit, directly contrary to the holding of the Supreme Court of Georgia in the case of *Georgia Railroad and Banking Co.* v. *Spinks*, 111 Ga. 571, hereinabove referred to. That case, it is true, involved a contribution in money, but it is clear that the same rule applies to contribution in services. We submit that the effect of the holding in that case would be that a contribution in services to someone other than the parent could not be the basis for dependency and contribution. As applied to the case under consideration, we submit the effect of the holding in the *Spinks* case is that the furnishing of services to the grandmother could not be the basis of dependency and contribution to the mother and that, accordingly, the holding of the Circuit Court of Appeals that such services do form the basis for dependency and contribution is directly contrary to the holding in the *Spinks* case above referred to. In this connection, see also the case of *Trammell* v. *Southern Railway Co.*, 182 Fed. 789.

2. The Circuit Court erred in failing to apply the law of Georgia, that a person testifying in his own behalf is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him.

The evidence of the plaintiff, testifying in her own behalf (R. 84-85) was positive that she was not dependent for support upon contributions either in money or services of the daughter. This evidence must be construed most strongly against the plaintiff and conclusively shows that she was not entitled to recover under the repeated rulings of the Supreme Court and Court of Appeals of Georgia. The Circuit Court failed to apply the principles of the following Georgia authorities:

"A person testifying in his own behalf is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him."

Southern Bank v. *Goetee*, 108 Ga. 796 (2);
Southern Railway Co. v. *Hobbs*, 121 Ga. 428 (1);
Gardner v. *Smith*, 39 Ga. App. 224 (4);
Butler v. *Morgan*, 40 Ga. App. 304 (2);
Stevens v. *Green*, 42 Ga. App. 512 (4);
Farrell v. *Barrett*, 54 Ga. App. 104 (1);
Thompson v. *Metropolitan Life Ins. Co.*, 45 App. 90 (2);
Davis v. *Akridge*, 199 Ga. 867 (2);
Weatherford v. *Weatherford*, 204 Ga. 553, 554;
Whitfield v. *Potts*, 205 Ga. 259, 272;
Partian v. *King*, 206 Ga. 530;
Ray v. *Marrett*, 84 Ga. App. 86.

Also the Federal authorities:

Drennen v. *Heard*, (5 Cir.), 211 Fed. 335 (2);
Clark Thread Co. v. *Willimantic Linen Co.*, 140 U. S. 481, 488, 35 L. ed. 521.

On Questions Common to Both Cases.

3. The Circuit Court erred in holding that the trial judge was not required to charge the jury that they should not consider the insurance in determining the question of negligence involved.

Although the insurance company was a legal party ~~plaintiff~~ defe, its liability was dependent upon a finding of negligence against Sherman B. Hogan, driver of the truck.

The suits alleged the existence of the large insurance policy (R. 2 and 14), which was the only reference to insurance that was necessary to establish the reason for the insurance company as a party.

The trial judge charged the jury (R. 216):

> "In no event could you find a verdict against the insurance company unless you found a verdict against Central Truck Lines, Inc., or Sherman B. Hogan, and the amount against the insurance company can in no wise exceed its limit under its policy which is $50,000.00 in each case."

Also the trial judge charged (R. 220, 221):

> "In that connection I charge you that if you find a verdict against the defendant, Sherman B. Hogan, it is necessary for you to find a verdict against the defendant Central Truck Lines, Inc., inasmuch as he admitted he was their agent. In other words if you find a verdict against the defendant Sherman B. Hogan, you will have to find against the defendant Central Truck Lines, Inc. and the insurance company in the case in which they are sued jointly with Sherman B. Hogan."

But these instructions did not caution the jury not to consider the fact of insurance in determining the question of negligence.

Then in the midst of the charge the trial judge (R. 221) openly inquired whether the insurance policy covered the driver, Hogan, and insisted on an answer, and instructed the jury that the insurance company was the insurer of Hogan as well as Central Truck Lines, although counsel insisted that the question of insurance was being unduly magnified.

Since it made no difference to any issue whether Hogan was protected or not, and the action of the trial judge tended to magnify the insurance feature, petitioners filed a written request to charge in the following language (R. 203):

> "I charge you further that the fact that Fireman's Fund Indemnity Company issued a policy of

liability insurance to protect Central Truck Lines, Inc. must not be considered by you in determining whether or not the defendant, Sherman B. Hogan the driver of the truck, is liable to the plaintiff under the instructions given you by the Court. The Court reminds you that you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether or not Sherman B. Hogan was negligent you should be influenced to the least degree by the existence of the liability insurance policy of Fireman's Fund Indemnity Company, then your verdict would be an improper one, and one without proper foundation."

The trial judge at no time particularly cautioned the jury not to consider the existence of insurance in determining the question of negligence.

This is contrary to the duty of the trial judge, as illustrated by the Court of Appeals of the District of Columbia in the case of *Paxson* v. *Davis*, 65 F. 2d, 492 at page 495, where it said:

> "Such evidence, however, may be admitted where it is material as tending to establish an incidental fact in issue, as for the purpose of showing the interest or bias of a witness as an agent of an insurance company, but, where it is so admitted, *the court should caution the jury to receive it only for such purpose and not to consider it in regard to defendant's duty or liability to plaintiff*. (Emphasis supplied.)

And the same Circuit Court in the case of *Brooke* v. *Croson*, 58 F. 2d 885, 886 (C. C. D. C.), has emphasized that evidence of insurance is not relevant to the issue of negligence in the following language:

> "It is established by the overwhelming weight of authorities that as a general rule it is reversible

error in the trial of an action for damages for personal injury to permit the plaintiff to introduce evidence to show that the defendant is protected by liability insurance against such accidents. It is held that such evidence is not *relevant to the issue of negligence,* and can have no effect but to induce a verdict based on the fact that an insurance company, and not the defendant, must pay the award". (Emphasis supplied.)

Whether the fact that insurance existed was erroneously injected into the case, as in *Brooke* v. *Croson, supra,* and in *Minnick* vs. *Jackson,* 64 Ga. App. 554, or whether it was legally before the jury on an incidental issue, as in *Paxson* v. *Davis, supra,* the prejudicial effect is recognized, as is the duty of the trial judge to clearly and firmly admonish the jury not to let this fact affect them in their determination of negligence.

It is, therefore, submitted that the decision of the Court of Appeals that "it is difficult to see how truthful references to the fact of insurance could be said to magnify the fact any more than was already apparent to the jury", is in conflict with the above decisions of the Court of Appeals of the District of Columbia, and of the Court of Appeals of Georgia.

The request to charge was correct in principle, and substantially in the same language used by the trial judge to admonish the jury in *Maryland Casualty Co.* v. *Kelly* (4 Cir.), 45 F. 2d 788, 789.

It is difficult to see how the language of this request "might prevent the plaintiffs themselves from securing a fair appraisal by the jury of the question of negligence", as ruled by the Court of Appeals. As a matter of fact the instruction must be in strong and unmistakable terms, else a mistrial should be declared. The Georgia Court of

Appeals in the case of *Minnick* v. *Jackson*, 64 Ga. App. 554, 560, held that a mistrial should have been declared because the instructions of the judge were not sufficiently strong, saying

> "The plaintiff's voluntary introduction into evidence that the defendant had insurance was calculated to suggest to the jury that any damages found in favor of the plaintiff would be paid by the insurance company, and was highly prejudicial to the defendant's cause. We think it tended to relax the consciences of the jurors trying the case and render them less responsive to their oaths to do impartial justice between the parties. We do not think the mere exclusion of the evidence, the subtle rebuke of counsel, and the mild direction which the court gave the jury with reference to the evidence, had the effect of disabusing the prejudicial impression this evidence must have created on the minds of the jury."

Conclusion.

1. As to the right of Anna Laura Williams to recover the logical effect of the holding of the Circuit Court of Appeals in this case is to nullify the provisions in the Georgia Statute requiring dependency and contribution. This is so for the reason that, if the facts, as shown in the case under consideration, provide a basis for dependency and contribution under the Georgia Statute, then it is difficult to conceive of any case in which dependency and contribution could not be shown, and the effect, therefore, is to nullify these provisions. We respectfully submit that this holding by the Circuit Court of Appeals is directly in conflict with the Statute and decisions of Georgia hereinabove referred to.

2. On the question of the insurance feature, common to both cases, it is respectfully submitted that the only way to even approach justice to defendants when a large liability insurance policy is before the jury is for the trial judge to especially admonish the jury in line with the special request made in these cases. The decision of the Circuit Court for the Fifth Circuit is contrary to the decisions of the Circuit Court for the District of Columbia, and others, including the Appellate Courts of Georgia.

3. On both questions, it is submitted that the Circuit Court has failed to apply well established principles of law, on vital and far-reaching issues, and that a writ of certiorari should be granted to review and reverse the decision of the Circuit Court.

Respectfully submitted,

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